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Nos. 95-1681, 95-1682, 95-1710

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF LOUISIANA *ex rel.* RICHARD P. IEYOUB,
Appellant,

v.

RAY HAYS, *et al.*,
Appellees.

LOUISIANA LEGISLATIVE BLACK CAUCUS, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

UNITED STATES,
Appellant,

v.

RAY HAYS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether these appeals are moot because Louisiana has repealed the challenged districting plan and adopted the court-ordered plan requested by the plaintiffs.

2. Whether the district court's finding that "race was the predominant factor" driving Act 1 was clearly erroneous.

3. Whether the district court erred when it found insufficient evidence of a compelling interest to justify segregation of Louisiana's voters by race.

4. Whether this Court should consider the appropriateness of the court-imposed plan when (1) such arguments were neither raised nor passed on below and (2) only the permissive intervenors have challenged the district court's remedy in this Court.

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MOTION TO DISMISS OR AFFIRM

Appellees respectfully request that this Court dismiss these appeals or, in the alternative, affirm the judgment of the three-judge District Court. That judgment for the second time held unconstitutional the Louisiana redistricting scheme set forth in Louisiana Acts 1994, First Extraordinary Session No. 1 ("Act 1").

These appeals are now moot because Louisiana has repealed Act 1, and thereby granted appellees the very relief they sought in this litigation. Indeed, Louisiana has not only repealed the constitutionally-repugnant Act 1, but it has specifically adopted the same redistricting plan ordered by the court below. *See* Louisiana Acts 1996, First Extraordinary Session No. 96 ("Act 96") (reprinted in Second Supp. to Opp. to Pending Applications for Stay, filed May 15, 1996 and attached in pertinent part hereto as Appendix A).

Unsuccessful both in the courts and the legislature, however, the supporters of Act 1 doggedly seek to keep this case alive by asking this Court to issue an advisory opinion reviewing that Act's constitutionality. But this litigation already has been resolved in the democratically optimal fashion—after having its day in court, the state legislature has ratified the court-ordered plan. The courts should seek to encourage such responsible legislative action, not to thwart it.

It would be remarkable, to say the least, for this Court now to punish Louisiana for voluntarily adopting the court-ordered plan. Although the Members of this Court have disagreed over the propriety of federal-court intervention in the redistricting process, all agree that the States, and not the federal courts, should have primary responsibility for that process. What has happened here is the best-case outcome for all concerned: rather than having a federal-court plan imposed on Louisiana by force, the State has decided to adopt that plan voluntarily. The political process has worked. Appellants' attempt to continue fighting their losing war in court must be soundly rejected.

STATEMENT OF THE CASE

In the three years since this Court's decision in *Shaw v. Reno,* 113 S. Ct. 2816 (1993), the three-judge court below has held *three* trials on the constitutionality of Louisiana's redistricting plans, and has *three times* invalidated Louisiana's plan. The first decision invalidated Louisiana Acts 1992, No. 42 ("Act 42"), which contained the notorious Z-shaped District 4 (the so-called "Zorro" district), which "[t]he State now concedes . . . was bizarre." *Hays II*, La. App. at 65 n.1.

The Louisiana Legislature responded by passing Act 1 guided by the Justice Department's threatened denial of preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The district court invalidated that districting plan, and the United States and Louisiana appealed. After noting probable jurisdiction and hearing argument, this Court held that the plaintiffs challenging Act 1 lacked standing because they did not live in District 4. *United States v. Hays*, 115 S. Ct. 2431 (1995).

On remand, the plaintiffs amended their complaint to add new plaintiffs who resided in District 4 as well as new allegations about District 5, where the original plaintiffs live. Plaintiffs also filed a new and identical action, which was consolidated with the original action. *Hays III*, La. App. at 8. The trial court allowed the Louisiana Legislative Black Caucus, Congressman Cleo Fields, and several residents of District 4 of Act 1 to intervene as defendants (collectively the "permissive intervenors"). The court held another trial on October 30 and 31, 1995, allowing live testimony and witness declarations from all parties. The court's judgment striking down Act 1 and imposing a court-devised plan was entered on January 5, 1996. *Id.* at 39.

A. The Demise of Act 42 and the Zorro District

In May 1992, "a legislative alliance between the Black and the Republican Caucuses" implemented a race-based approach to redistricting in response to Louisiana's loss of one

seat in the United States House of Representatives. *Hays I*, La. App. at 144 n.54. The result was Act 42 and its 65% black "Zorro" district, which spanned a distance of almost 600 miles. *Id.* at 131. The alliance of forces responsible for Act 42 never denied the controlling role of race; to the contrary, they championed race as the primary *justification* for Act 42. *Id.*

Four residents of Lincoln Parish filed suit to enjoin Act 42 in June, 1992. A three-judge panel convened to hear the case. The court held a two-day evidentiary hearing in August 1992. *Id.* The court denied plaintiffs' request for a preliminary injunction and allowed the 1992 congressional elections to proceed as planned under Act 42—including the "Zorro" District. *Id.* at 108-09. The district court then took plaintiffs' case on the merits under advisement until this Court rendered its judgment in *Shaw*, whereupon the court conducted a second two-day hearing in August 1993.

On December 28, 1993, the court struck down Act 42. *Id.* at 105. In so doing, the court rejected the argument that Section 5 of the VRA required a second majority-black district: "because Louisiana lost a seat in the United States House of Representatives, a plan with one black majority district would satisfy the Section 5 non-retrogression requirement given no more dramatic shift in the statewide ratio of white-to-black voters than is demonstrated by a comparison of the 1980 and 1990 census figures." *Id.* at 150 n.64.

B. Act 1 Replaces Act 42

While the invalidation of Act 42 was on appeal to this Court, the State convened a special legislative session to prepare a new redistricting plan. Notwithstanding the trial court's earlier admonitions, many legislators "remain[ed] convinced that the Department of Justice would not pre-clear any plan that did not contain two majority/minority districts"—a belief DOJ "encouraged, if not demanded." *Hays II*, La. App. at 69 n.3.

The tacit alliance between the proponents of Act 42 and the Justice Department was very much in evidence during the 1994 special legislative session. On April 20, 1994, with the two chambers of the Louisiana Legislature deadlocked over a new plan, Justice Department officials chose to intervene—albeit indirectly—through a letter of questionable authority to counsel for the Louisiana Legislative Black Caucus. That letter, signed by the Honorable Deval L. Patrick, Assistant Attorney General for the Civil Rights Division, set forth an interpretation of VRA Section 5 and closed by opining that "it remains reasonable to conclude that the Voting Rights Act requires the state to devise a congressional redistricting plan with two black-majority districts." PX 21.[1]

Immediately upon circulation of the Patrick letter, the Louisiana House reversed its prior course and passed a previously-defeated bill creating two majority-minority districts. PX 52 at 1-3. On April 22, the Senate approved the House-passed bill (which modified slightly the Senate's original bill) despite an attempted filibuster. PX 53 at 3-4.

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[1] Plaintiffs learned during discovery that the Patrick letter was the result of a concerted effort between the Louisiana Legislative Black Caucus and the Department of Justice designed to influence the Louisiana Legislature in a manner analogous to the improper Justice Department contacts exposed in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995). On April 8, 1994, DOJ official Steve Rosenbaum conferred with counsel to the Black Caucus. Rosenbaum's notes of the conversation state: "Black caucus to send a letter asking for views. Still need for DOJ to do something. How quickly be able to turn it around?" PX 19. On April 11, Rosenbaum conferred again with counsel to the Black Caucus, who told Rosenbaum that "their clients and they as counsel in litigation thought it would be useful for the Department *to state its views publicly* about the application of the Voting Rights Act to Congressional redistricting in Louisiana . . . ." Rosenbaum Dep. vol. I at 114 (emphasis added). On April 15, counsel for the Black Caucus sent the promised letter "asking for views," PX 20, which did not mention the earlier telephone calls. On April 20, Deval Patrick provided the requested advisory opinion to counsel for the Black Caucus. PX 21.

Shortly thereafter, Governor Edwin W. Edwards signed Act 1 into law.

C. The Court's 1994 Decision Striking Down Act 1

After the State repealed Act 42 and enacted Act 1, this Court remanded to the trial court for consideration of Act 1. *Louisiana v. Hays*, 114 S. Ct. 2731 (1994). On July 6, 1994, plaintiffs filed an amended complaint challenging Act 1.

The district court ordered yet another two-day trial. The record at trial reinforced the inference of intentional racial classification arising from the "bizarre and irregular shape of District Four . . . [which] cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State." *Hays II*, La. App. at 65. *See also, Hays I*, La. App. at 131-32. Moreover, "[t]he Senators themselves admitted that race played a large if not dominant role in the map as it is now drawn," the court explained, and "[t]hose persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature." *Hays II*, La. App. at 65.

The State put forward two race-neutral explanations for its plan: (1) a geographer "testified that District 4 was drawn along the Red River Valley demonstrating a commonality of interest," and (2) witnesses claimed "that District 4 of the plan was modeled after the old eighth district in Louisiana . . . .." *Id.* at 78. The court dismissed these explanations, finding that "[t]he Red River valley theory is clearly a *post hoc* rationalization similar to the Mississippi River theory offered to support Act 42 and equally unbelievable." Similarly, the court found that "[t]he State's purported reliance on District Four's similarity to the 'old Eighth' is mere pretext." *Id.* at 66-67. The court accordingly applied strict scrutiny.

As compelling interests, the State "contend[ed] that [1] incumbency politics, [2] the Voting Rights Act, and [3]

remedying past legal and social or continuing social discrimination justified the racial segregation of voters." *Id.* at 68. The court acknowledged that "[a]dhering to federal anti-discrimination laws and remedying past or continuing discrimination could constitute compelling governmental interests—*if* the State could 'demonstrate a strong basis in evidence for its conclusion that remedial action was necessary.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion)) (emphasis added). Ultimately, the court found that Louisiana had presented no such basis in evidence. *Id.* at 67-69.

The court rejected the State's Section 2 defense because under *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), "[t]he evidence convincingly proves that the State cannot clear the first *Gingles* hurdle"—compactness. *Hays II*, La. App. at 70. Specifically, "[d]espite a minority population of approximately 30%, demographic distribution is simply too diffuse . . . to generate a majority voting age population in any district outside of the Orleans Parish region." *Id.* at 70 n.4.

Finally, the court dismissed Louisiana's contention that Act 1 was otherwise necessary to remedy past or present discrimination. Acknowledging the "sordid history of unconstitutional treatment of black citizens in Louisiana" that remains "indelibly imprinted in our memories," *Id.* at 70-71, 80-82, the court nevertheless concluded that the State had failed to provide "concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies." *Id.*

The court then formulated and implemented a redistricting plan for Louisiana. The United States and Louisiana appealed. This Court found that because the four plaintiffs did not reside in District 4, they lacked standing to challenge that district. *United States v. Hays*, 115 S. Ct. 2431 (1995).

D. The Revived Challenge To Act 1

On remand, the plaintiffs responded to this Court's opinion by (1) amending the complaint to add (a) eight new plaintiffs who resided in District 4 and (b) allegations about the intent of the Louisiana Legislature with regard to District 5 of Act 1, where the original four plaintiffs reside; and (2) filing an identical original action on behalf of all twelve plaintiffs, which the trial court consolidated with plaintiffs' amended action.

The parties stipulated the admission of the record of prior proceedings, and undertook discovery. That discovery and the plaintiffs' presentation at a two-day trial on October 30 and 31, 1995, convinced the trial court that this case is factually "on all fours" with *Miller v. Johnson*, 115 S. Ct. 2475 (1995). *Hays III*, La. App. at 12 n.33.

Consistent with *Miller*, the court found that "race was the predominant factor behind the Legislature's determination to draw a district map with two of seven districts being majority-minority" and that "race was the predominant factor driving the configuration of District 4." *Compare Hays III*, La. App. at 17 *with Miller*, 115 S. Ct. at 2488. The court based its findings on the evidence adduced during the entire litigation, including the plaintiffs' showings regarding "the shape of the district . . . 'in conjunction with its racial and population densities.'" *Hays III*, La. App. at 14. For example, the court credited plaintiffs' demonstration that "even down to the precinct level, the State considered only race in determining which pockets of voters to pull in and which pockets of voters to push out." *Id.* at 14; PX 14-2A; Weber Test., 10/30/95 Trial Tr. at 85-87.

Beyond this circumstantial evidence of racial gerrymandering, the court found direct evidence independently sufficient to subject Act 1 to strict scrutiny. *Hays III*, La. App. at 15. For example, "the cartographer charged with creating Act 1's districts readily admits that, in creating District 4, he concentrated virtually exclusively on racial demographics and

considered essentially no other factor except the ubiquitous constitutional 'one person-one-vote' requirement." *Id.*

The court further found that the Justice Department's role in Louisiana paralleled its role in Georgia, making the Louisiana Legislature "justifiably convinced that the United States Department of Justice would preclear no redistricting plan for Louisiana that failed to include a second majority-minority district." *Id.* The court pointed to the April 20, 1994 Deval Patrick letter (discussed above at 4) as the source of that belief. *Id.*; PX 21. In the court's view, "[t]he State's desire to comply with the Department's policy only reinforces the conclusion that the Legislature knowingly allowed race to become the predominant factor driving the enactment of Act 1." *Hays III*, La. App. at 16. The court concluded: "by demanding a maximization of majority-minority districts the Justice Department impermissibly encouraged—nay, mandated—racial gerrymandering." *Id.*

In rebuttal, the defense again offered three supposedly race-neutral justifications, each entirely inconsistent with the others: "(1) the boundaries were intended to coincide with the lines of Louisiana's 'Old Eighth' district; (2) the District as designed to follow the Red River; and (3) the District is actually majority-poor, rather than majority-black." *Id.* The court found the last two justifications to be "patently post-hoc rationalizations." *Id.* As for the "Old Eighth" justification, the court found it to be "equally spurious, albeit slightly less obvious." *Id.* The court determined that the old district "was used as a guise for amassing a large percentage of minority voters into one district, not as a means of following traditional district boundaries" *Id.* at 17. As a result, any examination of the Old Eighth merely "reinforces the conclusion that race motivated the design of District 4." *Id.* The court readopted its earlier finding in *Hays II* that the "Old Eighth" justification was "mere pretext." La. App. at 5 n.16.

As potentially compelling interests, the defense offered (1) compliance with the Voting Rights Act and (2) the

remediation of generalized past discrimination. Regarding the former, the court concluded that "federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Id.* at 18 (quoting *Miller*, 115 S. Ct. at 2490-91). Applying the factors in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the court again found that "the evidence convincingly proves that the State cannot clear the first *Gingles* hurdle"— compactness. *Hays III*, La. App. at 19. The black population outside of the majority-black District 2, the court concluded, "is so widely and evenly dispersed that, to create a congressional district that meets the one-person-one vote criterion and has even a simple majority black population, resort must be had to graphic design that constitutes racial Rorschach-ism." *Id.*

The court similarly rejected the claim that the evidence in the record of past discrimination against African Americans could constitute a compelling interest justifying the segregation of Louisiana voters. The court acknowledged that there is "a significant state interest in eradicating the effects of past racial discrimination." *Id.* at 20 (quoting *Miller*, 115 S. Ct. at 2490), but found that the defense failed to show "lingering effects of past discrimination in current voting laws and procedures. Neither have they provided *any credible evidence* that the Legislature considered this motivation when it adopted Act 1." *Hays III*, La. App. at 20 (emphasis added). The court thus concluded that "[g]eneralized societal 'remedying' of past discrimination can never meet the Supreme Court's requirement of particularized solutions for specifically identifiable vestiges of past discrimination." *Id.* (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)).

E. Post-Trial Proceedings and Legislative Ratification of the Court Plan

In striking down Act 1, the trial court found that the State had "persisted in defending the indefensible" and that there was "no basis for believing that, given yet another

chance, [Louisiana] would produce a constitutional plan." *Hays III*, La. App. at 23. At plaintiffs' request, the court accordingly revived the same plan it had imposed in the earlier challenge to Act 1.

Significantly, none of the defense parties ever asked for a hearing on the issue of remedy or challenged the Court's authority to implement a plan of its own design or, more specifically, the 1994 court-ordered plan sought by plaintiffs. Only *after* the court's decision—more than a month after judgment and three months after trial—did the defendants move for a stay, arguing for the first time, *inter alia*, that the court should have held a hearing on the issue of remedy. Not surprisingly, the district court ruled that any challenge to its remedy had been waived, along with the claim that the court-ordered plan violated the Voting Rights Act. *See* La. App. at 54-55. The appellants reiterated the same arguments in their pending applications for stay in this Court.

Later, Louisiana Governor Mike Foster put ratification of the court-ordered plan on the agenda of a special session of the Louisiana Legislature to be convened on March 19, 1996. Both houses of the Louisiana Legislature subsequently adopted the court plan, which became law as Act 96 on May 13, 1996. *See* Appendix A.

GROUNDS FOR DISMISSAL OR AFFIRMANCE

Appellants essentially ask this Court to issue an advisory opinion regarding the constitutionality of Act 1, a plan that Louisiana has now repealed. Louisiana already has held two congressional elections with unconstitutional racially-gerrymandered districts. After *four* trials and *three* judicial opinions invalidating previous plans, the citizens of Louisiana, acting through their elected representatives, have chosen to settle this litigation. That settlement effort should not be thwarted by protracted litigation over a repealed plan. Accordingly, this Court should either dismiss these appeals or summarily affirm on the merits.

I. THE COURT SHOULD DISMISS THE APPEALS

The constitutionality of Act 1 is of purely academic interest in light of the Louisiana Legislature's repeal of Act 1 and enactment of Act 96. Regardless of any decision by this Court on the constitutionality of Act 1, the districts imposed by the trial court will remain in effect. Were this Court to note probable jurisdiction, any resulting opinion therefore would be wholly advisory. Moreover, because "the party seeking relief from the judgment below caused the mootness by voluntary action," the State "voluntarily forfeited [its] legal remedy by the ordinary processes of appeal . . . thereby surrendering [its] claim to the equitable remedy of vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391-92 (1994). The Court therefore should dismiss the appeals and leave in place the judgment below.

A. Act 96 Renders The Appeals Moot

Act 96, which simultaneously repeals Act 1 and enacts "the congressional redistricting plan contained in Ray Hays, et al. v. State of Louisiana, et al." in its place, became law on May 13, 1996. *See* Appendix A. Act 96 therefore provides the relief plaintiffs have sought all along. In the complaint, the plaintiffs asked the Court to "[d]evise and implement a lawful, court-ordered congressional districting plan." Complaint, Prayer for Relief ¶ 5. At trial, the plaintiffs asked the Court more specifically to implement "the very same plan that it did once before." 10/31/95 Trial Tr. at 293. *See also* Plaintiffs' Post Trial Br. at 1 ("Accordingly, this Court should again strike down Act 1 and place in its stead the constitutional plan as adopted by the Court in 1994"). By remedying its earlier unconstitutional action and complying with plaintiffs' repeated requests, the State mooted these appeals. *See Commissioner v. Shapiro*, 424 U.S. 614, 623 n.7 (1976) (challenge to timeliness of service of notice of deficiency mooted by timely service of new notice of deficiency).

In *Crowell v. Mader*, 444 U.S. 505 (1980), this Court was presented with the same situation. The district court there

had invalidated a redistricting plan in Tennessee, and had enjoined the State "from conducting any elections pursuant to that plan." *Id.* at 505. After the State appealed, the appellees informed the Court that the State had enacted a new plan; the appellees further argued that the new plan mooted the State's appeal from the injunction against the old plan. This Court agreed, and dismissed the appeals. *Id.* at 506. The same disposition of the appeals should hold here.

It does not matter for present purposes that Louisiana is a covered jurisdiction under the Voting Rights Act. The court-ordered plan, of course, is not subject to Section 5 because it is "perfectly clear" that "the Act's preclearance requirement does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation." *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981); *Connor v. Johnson*, 402 U.S. 690, 691 (1971) ("a decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act."). As of January 5, 1996, therefore, the only enforceable congressional districting plan in Louisiana was the court-ordered plan. *Hays III*, La. App. at 40.

Accordingly, contrary to the permissive intervenors' suggestion, *see* Reply in Further Support of Applications for Stay at 2, filed April 29, 1996, Act 96 is not subject to the preclearance requirements of Section 5. Even if Act 96 were simply a legislatively-devised plan rather than a judicial plan, preclearance would not be necessary because Act 96 does not constitute a *change* in voting procedures from the appropriate baseline. Simply put, Act 96 is no different from the enforceable court-ordered plan that was in effect immediately before it became law. Although this Court has interpreted Section 5 broadly to apply to "any state enactment which alter[s] the election law of a covered State *in even a minor way*," *Allen v. Board of Elections*, 393 U.S. 544, 566 (1969) (emphasis added), nothing in the Voting Rights Act or this Court's decisions requires Section 5 procedures for state action that indisputably does *not* change currently effective voting

procedures *at all*. Surely the Voting Rights Act does not prevent a State from enforcing the voting procedures it has been *ordered* to follow by a three-judge federal court as a remedy for a constitutional violation.

This conclusion comports with the purposes of the Voting Rights Act. Section 5 was designed to prevent covered States from keeping one step ahead of the law by "enacting new and slightly different requirements with the same discriminatory effect" once old laws were stricken down. *Allen*, 393 U.S. at 548. There is no such concern here. The plan now in place does not require preclearance because it was devised and implemented by three federal judges intimately familiar with Louisiana's culture and history as a remedy for a constitutional violation. *Cf. McDaniel*, 452 U.S. at 138 (court-imposed plan that was devised and submitted to court by legislature is subject to Section 5 procedures). The court below ensured that the plan would not be retrogressive, *see Beer v. United States*, 425 U.S. 130 (1976); moreover, the court surely did not harbor any unconstitutionally discriminatory intent against minority voters. The legislature's decision to implement the court's plan perforce is not motivated by an intent to discriminate against minority voters, but instead by an intent to settle the litigation and remedy an earlier constitutional violation by the State. The State has not thereby thwarted Section 5, but instead has put itself in the same position as if it had chosen not to appeal.

In summary, Act 96 moots the appeals because this Court can no longer provide meaningful relief to the appellants. Even if this Court were to reverse the court-ordered plan as appellants request, Act 96—the same plan—would remain federally-enforceable state law. Accordingly, this Court should dismiss these appeals. *See United States v. Evans*, 213 U.S. 297 (1909) (statute cannot allow federal court to consider appeal by government from judgments of acquittal because appellate court cannot undo a ruling of acquittal).

B. This Court Should Not Vacate The Judgment Below

Appellees request that the Court not vacate the judgment below. Vacatur of the lower court's judgment is not granted as a matter of course when this Court dismisses an appeal as moot. *See, e.g., Voltaggio v. Caputo*, 371 U.S. 232 (1963); *Matthews v. Little*, 397 U.S. 94 (1970); *Minnesota Newspaper Ass'n, Inc. v. Postmaster General*, 488 U.S. 998 (1989). A party seeking review who is "frustrated by the vagaries of circumstance" need not "be forced to acquiesce in the judgment"; but when a losing party to the litigation voluntarily moots the case, the circumstances do not justify the equitable remedy of vacatur. *U.S. Bancorp*, 115 S. Ct. at 393. The State therefore is much in the same position as if it had foregone the right to appeal altogether, or had withdrawn the appeal after filing its notice of appeal and jurisdictional statement. *See Karcher v. May*, 484 U.S. 72, 83 (1987).[2]

In any event, even if this Court were to vacate, it should not order that the entire case be dismissed. Where other issues such as calculation of a reasonable attorney's fee remain to be determined, vacatur is "without prejudice to such further proceedings in the District Court as may be appropriate." *Crowell*, 444 U.S. at 506. *See also Maher v. Gagne*, 448 U.S. 122, 129 (1980) (party who prevails through settlement entitled to fees under § 1988).

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[2] The Louisiana Attorney General's office apparently believes that Act 96 requires preclearance. *See New Remap to Become Law*, New Orleans Times-Picayune, May 14, 1996, at A10. Were this Court to vacate the judgment below without clearly stating that preclearance is not required, further litigation might result if the Louisiana Attorney General follows such a course and DOJ (a losing party in this litigation) denies preclearance pursuant to its "maximization policy" in an attempt again to force Act 1 on the citizens of Louisiana.

II. THE COURT DID NOT CLEARLY ERR WHEN IT SUBJECTED ACT 1 TO STRICT SCRUTINY

If this Court reaches the merits, it should summarily affirm the judgment below. The district court applied the proper legal standard and found that "the plaintiffs have decisively established that race was the predominant factor" behind the districts of Act 1. *Hays III*, La. App. at 17. The court further concluded that Act 1 was unsupported by any compelling interest. Under *Miller*, the findings below are amply supported.[3] Although the appellants claim that the drafters of Act 1 employed "a judicious and proper balancing of the many factors appropriate to redistricting," U.S. J.S. at 13, the court did not clearly err in holding otherwise.

A. The Trial Court's Finding That "Race Was The Predominant Factor" Driving Act 1 Is Not Clearly Erroneous

Contrary to the State's assertions, the court below did not hold that "any intentional creation of a majority-black election district renders a state's congressional redistricting plan constitutionally suspect." La. J.S. at 8. Nor is the court's holding merely a "rephras[ing]" of its earlier opinion. Intervenor J.S. at 13. Instead, the court's judgment was grounded firmly in *Miller* and record evidence that the State harbored an unconstitutional discriminatory intent. The trial court therefore properly held that the legislature "subordinated traditional race-neutral districting principles—such as compactness, respect for commonality of interests, and respect

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[3] The intervenors' challenge to plaintiffs' standing, which occupies only a sentence of their brief, Intervenor J.S. at 27, deserves only a brief mention here. It is undisputed that eight of the plaintiffs live in District 4, the primary focus of this challenge to Act 1. *Hays III*, La. App. at 10. Moreover, after remand, plaintiffs added allegations to the complaint and produced evidence of the legislature's race-based intent with regard to District 5, where the original four plaintiffs live. Therefore, "[a]s residents of [the challenged districts], all appellees had standing." *Miller*, 115 S. Ct. at 2485.

for political subdivisions—to enact a plan containing a second majority-minority district" *Compare Hays III*, La. App. at 13 *with Miller*, 115 S. Ct. at 2488. That factual finding must be upheld unless clearly erroneous. *Hernandez v. New York*, 500 U.S. 352 (1991); *Rogers v. Lodge*, 458 U.S. 613 (1982).

1. Circumstantial evidence of racial intent

The court's finding is amply supported by circumstantial evidence that the legislature subordinated all traditional districting principles to racial considerations. In each instance, the evidence showed (1) a substantial disregard for traditional districting principles, *see Miller*, 115 S. Ct. at 2497 (O'Connor concurring); and (2) subordination of those principles to racial considerations, *Miller*, 115 S. Ct. at 2488.

Compactness: The plaintiffs presented evidence that District 4 of Act 1 is the least geographically compact district in the history of Louisiana. Their expert, Dr. Ronald Weber, presented two statistical measures of geographic compactness—the dispersion score and the Max Aspect score. On the dispersion score, District 4 of Act 1 was less compact than any district in Louisiana history with the exception of the predecessor of a New Orleans district ultimately invalidated under the Voting Rights Act as a racial gerrymander. PX 14-8A-G; *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983). The Max Aspect score showed Act 1's District 4 to be the least compact district in Louisiana history. This departure from Louisiana's past practice was explained by the legislature's desire to connect the black neighborhoods of the four major cities outside New Orleans in a single district. The legislature could not have created a second black-majority district otherwise since nearly 58% of the black citizens (53% of the black registered voters) in District 4 resided in these four cities.

And the mapmaker of Act 1 admitted that the purpose of going to each of these cities was to "capture" a "dense black population." Koepp Dep. at 76, 88, 90.

Respect for political subdivisions: Plaintiffs showed, among other things, that Act 1's District 4 divided twelve of its fifteen parishes—the most "fundamental unit[s] of societal organization in the history of Louisiana. . . .." *Hays I,* La. App. at 132. District 4's twelve split parishes constituted: (1) *three times* more split parishes (previous maximum—four) than any single previous congressional district; *see* PX 3; 1994 USX 8 at Table 1; and (2) almost *twice* as many split parishes (previous maximum—seven) as any *entire congressional districting plan* in Louisiana history. Similarly, Act 1 split *seventeen* cities and towns—*fourteen* strung along District 4's borders. District 4 alone splits four major cities (Shreveport, Alexandria, Lafayette and Baton Rouge), three of which never have been split in Louisiana history.

If further proof were needed, the evidence revealed that the legislature *consistently* divided parishes by placing most *black* registered voters (more than 82% of blacks in split parishes) in District 4, while placing most *white* voters (nearly 77% of whites in split parishes) in the neighboring predominantly white Districts (3, 5, 6, and 7). Likewise, in each split city, areas with large *black* majorities (73% to 80%) were placed into District 4 while areas with even larger *white* majorities (83% to 88%) were placed into in Districts 5, 6 and 7. *See* PX 4.

Shared communities of interest: Plaintiffs' expert opined that "District 4 in Act 1 contains a broad array of agricultural, economic, cultural, and other interests and . . . cannot be explained as an attempt to bring together persons sharing common interests other than race." PX 14 at 6. The district court agreed, and further concluded that the result of this artificial joining of diverse interests was due to racial considerations. *Hays III*, La. App. at 13. As in *Miller*, "there are no tangible 'communities of interest' spanning the hundreds of miles" of District 4. 115 S. Ct. at 2490. Although the United States may disagree and argue that there was

evidence that "District 4 was designed to combine persons with common interests," U.S. J.S. at 14, that disagreement does not make the court's findings clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

2. Direct evidence of racial intent

The plaintiffs also presented direct evidence of racial purpose. The court found that Glenn Koepp, the mapmaker of Act 1 "readily admits that, in creating District 4, he concentrated virtually exclusively on racial demographics and considered essentially no other factor . . . .." *Hays III*, La. App. at 15. Koepp testified that he used computer software called "Plan Builder" that kept running tallies of demographic statistics. Koepp Dep. at 21. Koepp testified that he used only racial information in devising the tortuous boundaries of Act 1:

Q: [W]hat were the windows that were up while you were drawing the districts in Act 1?

A: The one we talked about earlier with the data on it.

Q: So total population by race, —

A: Yeah.

Q: — voting age population by race, —

A: Yes.

Q: — and the voter registration by data by race?

A: Right, right.

Q: Was there anything on your screen about compactness?

A: No.

Q: Was there anything on your screen about contiguity?

A: I did not turn contiguity on, but there is— there was the option of turning it on.

Q: Okay. Was there any socio-economic data on the computer?

A: No.

Q: Was there any list of the number of parishes that were split?

A: No.

Q: Or municipalities?

A: No.

Q: But there was the one man-one vote up on the screen?

A: [A]bsolutely.

Q: Is there any capability of the program to measure communities of interest?

A: No.

Koepp Dep. at 78-79; *see also id.* at 31-32, 39-40. Although the appellants would interpret Koepp's testimony differently, U.S. J.S. at 15, La. J.S. at 10-12, their disagreement does not make the district court's findings clearly erroneous.

The role that race played was, of course, foreordained by the Justice Department's involvement. Thus, legislators who participated in the debate over Act 1 believed that a second majority-minority district outside of New Orleans was required by DOJ's "policy of maximizing majority-black districts." *Miller*, 115 S. Ct. at 2492. Although Louisiana had not been denied preclearance for a congressional plan with only one majority-black district, the Deval Patrick letter, which broke the log-jam in the Louisiana House, loudly proclaimed DOJ's maximization policy. It therefore became clear to the legislature that "the Justice Department wanted two minority districts regardless." Adley Test., 10/30/95 Trial Tr. at 21. The

State did not contest this; to the contrary, one of its own legislative witnesses testified in writing to his belief at the time that a plan with fewer than two majority-black districts would not "receive preclearance by the United States Justice Department." 1994 SX 16 ¶ 6.

B. The Court Below Properly Rejected The State's Pretextual Race-Neutral Justifications

The trial court properly allowed the defense a full opportunity to present race-neutral explanations for Act 1. *See Miller*, 115 S. Ct. at 2488 ("Where . . . race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can 'defeat a claim that a district has been gerrymandered on racial lines.'"). Two of these race-neutral explanations—that District 4 purposely followed the Red River and that District 4 was designed as a poor district rather than a black district—were summarily rejected because there was no evidence that the legislature actually was motivated by these considerations. Indeed, the defense never presented its "socio-economic" argument in earlier proceedings on Act 1, and there was no evidence that District 4's boundaries were guided by a desire to group persons with economic similarities, or that the mapmaker even had access to such information. The appellants apparently now have abandoned the "Red River" justification, presumably because the mapmaker of Act 1 conceded that he did not intend to draw District 4 along the Red River. Koepp Dep. at 85-86.

The only remaining supposedly race-neutral justification advanced by the State is that District 4 is similar to the Old Eighth district under past districting plans. But the state's own evidence showed that the mapmaker "was asked to look at the old Eighth District" precisely because it was "the highest minority population district in the state other than the minority district number two." 7/21/94 Trial Tr. vol. 2 at 11. From that point on, parishes and parish parts were added or subtracted, always with the apparent aim of racial segregation.

The end result departed dramatically from any of the many versions of the "old Eighth." No previous configuration of the "old Eighth" ever split more than four parishes; District 4 split twelve. *See* PX 3. Likewise, no version of the "old Eighth" ever included fewer than twelve *full* parishes; District 4 included only three. *Id.*

Plaintiffs' expert, Dr. Ronald Weber, buttressed the Court's earlier findings with his testimony in the latest trial. His analysis showed that District 4 of Act 1 is more similar to the Zorro District than it is to any of the prior configurations of the Old Eighth. After comparing the overlap of population between the Old Eighth and District 4, Dr. Weber testified that "even though it might look on the map like there was some commonality between district, old District 8 and new District 4 in Act 1, the population analysis does not reveal that." 10/30/95 Trial Tr. at 107. Weber concluded that District 4 includes no more than 37.7% of the population of any prior version of the Old Eighth, *id.* at 108, with the population overlap in one case being as low as 18%. PX 14-10A. In contrast, a remarkable 54% of District 4's population came from the Zorro District, which was anchored by the black neighborhoods in the same four major cities split by District 4 of Act 1. PX 14-10B.

In sum, the court properly found that the "Old Eighth" justification was "mere pretext." *Hays II*, La. App. at 67. Based on the evidence before it, then, the court had little choice but to find that race was the "predominant factor" driving Act 1. That finding is not clearly erroneous, and should be upheld by this Court.

III. THE COURT DID NOT ERR IN REJECTING THE STATE'S PURPORTED COMPELLING INTERESTS

Applying strict scrutiny, the court properly recognized that Act 1 could be upheld only if "narrowly tailored to achieve a compelling governmental interest." *Hays III*, La. App. at 17. The defendants argued that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as well as amorphous claims of past discrimination, could serve as compelling interests in support of Act 1. The court properly held that neither of these purported interests could justify Act 1.

A. The Voting Rights Act Did Not Compel The Race-Based Districting of Act 1

The Voting Rights Act can provide a justification Act 1's race-based districting only if Act 1 is "reasonably *necessary* under a constitutional reading and application" of the Voting Rights Act. *Miller*, 115 S. Ct. at 2491 (emphasis added). Under the familiar standard of *Gingles*, a Section 2 plaintiff must show that (1) minority voters tend to vote as a bloc; (2) the majority consistently votes as a bloc to defeat candidates preferred by the minority; and (3) there is a geographically compact minority population sufficient to constitute a majority in a single district. *Gingles*, 478 U.S. at 50-51.

The district court properly concluded that the Voting Rights Act did not compel the creation of a district that is geographically less compact than any other district in Louisiana history. *See supra* at 16. Although the appellants attempt to argue that the district court failed to measure the compactness of District 4 against other Louisiana districts, U.S. J.S. at 16-17, Intervenor J.S. at 21, La. J.S. at 18, the district court actually made just that comparison. *Hays III*, La. App. at 14. To counter plaintiffs' statistical proof, the defense relied on nothing but the self-serving testimony of the mapmaker of Act 1 to the effect that District 4 is compact because

"compactness is in the eye of the beholder." Koepp Test., 7/22/94 Trial Tr. at 90.

"Compactness" under *Gingles*, however, is a question of fact, *Westwego Citizens for Better Gov't v. Westwego*, 906 F.2d 1042, 1046-47 (5th Cir. 1990), and the district court did not clearly err by accepting (1) the statistical evidence presented by the plaintiffs showing that District 4 is not geographically compact by Louisiana standards, *see supra* at 16; (2) evidence showing that District 4 could amass a majority black population only by joining the black neighborhoods of four major cities scattered across the State, PX 14;[4] and (3) the defense's own expert, who presented evidence that District 4 spans a greater distance than any other district in Louisiana history. 1994 USX 8 at Table 1. Because Section 2 does not clearly compel creation of such a district, the trial court properly rejected any contrary interpretation and its attendant constitutional problems. *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988).[5]

B. Amorphous Claims of Past Discrimination Cannot Justify Act 1

Appellants claim that "Louisiana in this case had a compelling interest in ameliorating the effects of racial bloc voting attributable to past and present governmental and private discrimination." U.S. J.S. at 17, Intervenor J.S. at 24-25, La. J.S. at 19-21. But a State cannot insulate

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[4] On similar facts, the district court in *Johnson v. Miller*, 864 F. Supp. 1354, 1389, *aff'd*, 115 S. Ct. 2475 (1995), found that "[t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties . . . ." There, as here, "DOJ's insistence that they are 'compact' renders the term meaningless." *Id.*

[5] Although the district court did not reach the other *Gingles* factors, plaintiffs introduced evidence of remarkable success for black-preferred candidates in senatorial, gubernatorial, and congressional elections in the years preceding trial. PX 14-4Q-T, 14-4W, 14-6.

discriminatory action from review simply "by conceding that [it] discriminated in the past, now that it is in [its] interest to make such a concession." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986) (plurality opinion). And as for racially-polarized voting, not only was there no finding below, but there was no reason to reach the issue in light of the court's dispositive finding that Act 1 failed *Gingles'* first precondition. Nor was there proof that any racially-polarized voting was "*attributable to* past and present governmental and private discrimination," U.S. J.S. at 17, or that gerrymandered districts would cure such polarization.

The district court therefore properly recognized the lack of any "concrete evidence of the lingering effects of past discrimination in voting laws and procedures." *Hays III*, La. App. at 20. Moreover, the court found that there was no credible evidence that the legislature was actually motivated by this desire when it passed Act 1. As in *Miller*, "there is little doubt that the State's true interest in designing the [] District" was not remedying past discrimination but instead was "creating a [] majority-black district to satisfy the Justice Department's preclearance demands." 115 S. Ct. at 2490.

Appellants seize upon an apparently approving reference in a plurality opinion to the "fair allocation of political power between white and nonwhite voters." *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 167 (1977) (plurality opinion). Subsequent decisions, however, have condemned racial *group* remedies under the Voting Rights Act except where a minority is "essentially . . . shut out of the political process." *Davis* v. *Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor concurring). And far from creating remedies beyond the Act, recent decisions hold that a Section 2 claim may not exist even where all three *Gingles* criteria are satisfied. *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2663 (1994); *Nipper v. Smith*, 39 F.3d 1494, 1512 (11th Cir. 1994) *(en banc), cert. denied*, 115 S. Ct. 1795 (1995). By contrast,

appellants' expansive additional remedy would make *Gingles'* requirements superfluous.

In sum, the district court properly found that Act 1 could not survive strict scrutiny. Because racial classifications deserve "the most searching judicial inquiry," *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995), the court properly held that the evidence here did not make out a compelling state interest justifying Act 1.

IV. THE COURT'S REMEDIAL PLAN WAS PROPER

The permissive intervenors alone argue that "the district court exceeded its authority in imposing a permanent remedial plan that departs from State policy and violates the Voting Rights Act." Intervenor J.S. at 27-29. They further argue that the court should not have imposed the remedy "without providing the Louisiana Legislature an opportunity to redraw the districts." *Id.* at 27.[6] This Court should reject these arguments because none of them was raised or passed on below, La. App. at 54-55, and because the United States and the State have not raised these arguments even here. This case therefore is entirely unsuitable for this Court's review either along with or after decision in *Abrams v. Johnson*, Nos. 95-1425 and 95-1460, *probable jurisdiction noted*, __ S. Ct. __ (May 20, 1996).

Nor do any of these arguments have merit, assuming they were not waived. The court plan is fully consistent with Louisiana policy, as evidenced by the speedy passage of Act 96. Moreover, any suggestion that the court plan actually violates the Voting Rights Act requires more careful analysis than a calculation of the percentage of majority-black districts, Intervenor J.S. at 29, U.S. J.S. at 17, 18, especially when the

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[6] The United States and Louisiana apparently have abandoned on appeal any argument about the propriety of the remedy implemented by the district court. The United States claims only in a passing reference that the court plan allegedly violated Section 2 of the Voting Rights Act. U.S. J.S. at 17 n.2.

court below found (based on expert testimony presented by the plaintiffs) that "our plan, with its one black majority and three influence districts, empowers more black voters statewide than does Act 1's plan." *Hays III*, La. App. at 6 n.17.

CONCLUSION

For the foregoing reasons, the appeals should be dismissed as moot. In the alternative, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A
Act 96 [EXCERPTED]

First Extraordinary Session, 1996

HOUSE BILL NO. 49

BY REPRESENTATIVES BRUNEAU, MCCALLUM, LANCASTER, SCALISE, AND WALSWORTH AND SENATORS GREENE, DARDENNE, AND HOLLIS

AN ACT

To enact R.S. 18:1276.1 and to repeal R.S. 18:1276, to adopt the congressional redistricting plan contained in Ray Hays, et al. v. State of Louisiana, et al.; to provide for the redistricting of the seven congressional districts according to the congressional redistricting plan contained in Ray Hays, et al. v. State of Louisiana, et al.; to provide for the terms of members of congress currently serving; to provide for filling certain vacancies; to provide for effective dates; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. The Legislature of Louisiana adopts as its own the congressional redistricting plan for the state of Louisiana ordered by the United States District Court, Western District of Louisiana, Shreveport Division in the case of Ray Hays, et al. v. State of Louisiana, et al., Nos. 92-1522 and 95-1241.

Section 2. R.S. 1:1276.1 is hereby enacted to read as follows:

§1276.1. Congressional districts

* * * * *

Section 3. R.S. 18:1276 is hereby repealed in its entirety.

Section 4. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

/s/

SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

This bill having been submitted to the Governor and no action having been taken within the time provided by the Constitution, said bill becomes law without his approval.